No. ~~1251~~ 39

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1951~~ 1952

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al. as ARKANSAS PUBLIC SERVICE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Arkansas.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Counsel for Petitioner.

Of Counsel for Petitioner:
WRAPE & HERNLY,
1804 Sterick Building,
Memphis, Tennessee.

1624 I Street,
Washington 6, D. C.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above entitled case on January 7, 1952.

OPINIONS BELOW.

The opinion of the Chancery Court of Pulaski County, Arkansas (R. 219), is unreported. The majority and dissenting opinions of the Supreme Court of Arkansas (R. 225, 232) are unreported. The per curiam order of the Supreme Court of Arkansas (R. 237) is unreported.

JURISDICTION.

The final judgment of the Supreme Court of Arkansas was entered on January 7, 1952 (R. 237). By order entered in this Court on March 31st, 1952, the time for filing this petition was extended to and including April 21st, 1952.

The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1257 (3). Although the federal questions here sought to be reviewed were not discussed by the majority of the Supreme Court of Arkansas in its opinion (R. 225), reference to a portion thereof was made in the dissenting opinion (R. 232), and all of such questions were specifically and properly by brief, oral argument and petition to rehear (R. 234), considered by and determined adversely to the interests of petitioner by the Supreme Court of Arkansas, as is reflected by "Certificate as to Existence of a Federal Question" ordered to be entered by the court en banc. Said certificate appears at page 238 of the record and is attached hereto as Appendix A, page 19, infra.

QUESTION PRESENTED.

Whether state regulatory bodies may, by indirection in administering state statutes designed to permit regulation by such bodies of intrastate common and contract motor carrier transportation, regulate, unduly burden and destroy interstate commerce performed by private carriers of property by motor vehicle, Congress having pre-empted the field of interstate motor carrier transportation, whereby such private carriers are deprived of their property without due process of law.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix B, infra, pages 21-23.

STATEMENT.

Petitioner, Lloyd A. Fry Roofing Company, is the largest composition asphalt roofing manufacturer in the United States, at the time of the trial below having 19 plants located throughout the United States. One of such plants is located at Memphis, Tennessee, from which point roofing is sold and delivered to points in a number of states, including the State of Arkansas (R. 45, 46). It has a wholly-owned subsidiary, Volney Felt Mills, Inc., which manufactures felt for use by petitioner; the operations of Volney are on petitioner's premises and are conducted under the direction of petitioner's supervisory personnel. The officers and directors of the two corporations are the same (R. 45, 46, 95).

In November, 1949 (R. 116), in conection with a new pricing and merchandising program and in order to enjoy the numerous advantages detailed at pages 83-86 of the record, petitioner determined to deliver its products by utilization of a fleet of tractor-trailer units to be operated by its employees and in the exclusive possession and under the sole direction and control of petitioner (R. 62-63, 69, 77-78, 82-83). These units were leased from Frank E. Whitington, Inc., a motor vehicle leasing and maintenance service (R. 23), under long term written leases, compensation for use thereof being paid upon the basis of running miles (R. 7-14, 25, 70-71, 87, 95). At all times and in every respect equipment leased by petitioner was under its sole and absolute direction and control (R. 87-88).

At the time of the trial petitioner, at Memphis, was leasing eighteen trailers and twelve tractors from Whitington;

Whitington owned all the trailers, specially constructed for petitioner's use, and seven of the tractors (R. 24, 71, 74-75, 85). Five of the tractors leased by Whitington to petitioner were owned by persons employed by petitioner as drivers, these persons having leased the tractors to Whitington under written long term leases, the latter having then leased same to petitioner under the terms of its lease agreement with petitioner (R. 24, 34-36, 7-14, 70-71).

Petitioner has no connection with, control over or knowledge of arrangements between Whitington and driver-owners (R. 76, 100). Neither does Whitington have any connection with employment of drivers by petitioner, nor exercise any supervision over the drivers (R. 32, 38, 63, 105). There was no agreement that drivers employed by petitioner would be assigned to the operation of equipment which they might own (R. 38, 76, 87), but, as a matter of sound business practice, when petitioner learned that an employee owned equipment in its fleet, it endeavored to assign him to the operation thereof. (R. 103-104). At no time has it been any concern of petitioner as to who owned the equipment (R. 76). Drivers do not always operate equipment owned by them (R. 86).

Whitington has absolutely no connection with operation of equipment by petitioner (R. 38-42).

A true employer-employee relationship existed between petitioner and its drivers irrespective of whether they did or did not own equipment, and there was no distinction whatsoever in the relationship between petitioner and drivers who did or did not own equipment either in the method of employment, compensation or direction and control. Petitioner's records with respect to all individual drivers involved in this proceeding are exhibits to the official transcript and it is stipulated that these records are representative of the records on employment of all drivers by petitioner (R. 69-70); by further stipulation only one

set of such records has been printed (R. 241), the stipulation setting forth the reason, in each instance, for the omission of an exhibit in printing.

With respect to all drivers, uniform employment applications are required (R. 47, 185); the employer conducts investigation as to character and ability and requires a medical examination by a physican of its choice (R. 48); fidelity bonds are required, with the premium being paid by petitioner (R. 49, 186); truck drivers are compensated on the basis of so much per running mile, with incidentals, and carried on petitioner's payroll as employees (R. 50, 57, 188); petitioner deducts social security and withholding taxes on all drivers as employees, pays workmen's compensation premiums thereon; the drivers get the benefit of petitioner's uniform vacation plan; and the drivers participate, at their election, in group insurance available only to employees of petitioner (R. 58, 60, 67, 101); the drivers are paid regular employee checks (R. 60, 189); petitioner alone employs and discharges drivers, gives no consideration to whether an applicant does or does not own equipment, determines the compensation to be paid drivers; there is no difference in compensation between drivers, nor is there any variation in mileage rate depending on load (R. 61-62).

Petitioner alone determines when, where, how and what will be transported in leased equipment and by the drivers thereof; does not permit the use of such equipment for any purposes other than its own, nor its drivers to be employed by any other person (R. 62-63, 69). The drivers have no discretion as to the equipment they will operate (R. 77).

Petitioner assumes full responsibility for operation of the vehicles as well as safety of cargo, and complies with all of the hours of service and safety regulations of the Interstate Commerce Commission applicable to private carriers (R. 63-66, 77-78, 190).

Neither bills of lading nor waybills are used, a simple delivery ticket being employed (R. 66, 191); reports of defects in equipment are made to petitioner by drivers (R. 68, 192).

Insofar as the State of Arkansas and the issues at bar are concerned, all transportation performed by petitioner and its drivers is interstate transportation (R. 45-46), being from Memphis to points in Arkansas of petitioner's own merchandise or of raw materials for Volney Felt Mills, Inc., from points in Arkansas to Memphis, Tennessee; no charge being made for this service for the wholly owned subsidiary (R. 95-96, 116).

The primary business of petitioner is the manufacture and distribution of asphalt roofing, and during the period in suit utilization of the transportation method under attack resulted in a substantial deficit (R. 78-79).

Under the guise of enforcing the Arkansas Motor Carrier Act, the representatives of respondents arrested a number of petitioner's drivers making interstate deliveries, impounded and delayed its merchandise and equipment, prevented fulfillment of its contract with its customers, and averred their intention to continue so to do. No question of taxation or exercise of police power is presented, the sole issue being whether common or contract carriage was being performed without a permit or certificate from the Arkansas Public Service Commission (R. 112, 122-136, 138). Only those drivers who owned the tractors then being operated by them as petitioner's employees were arrested, and no issue has been made by respondents as to the legality of identical transportation being performed by petitioner's drivers who did not own tractors.

An injunctive action was instituted (R. 1-13) and tried in the Chancery Court for Pulaski County, Arkansas, following which the Chancellor made comprehensive findings

and conclusions (R. 219-223), holding that petitioner's equipment leases were bona fide, had been strictly adhered to, that a true employer-employee relationship existed between petitioner and all of its truck drivers, and that petitioner was a private carrier. Respondents were enjoined from interfering with petitioner or its employees in performance of the described transportation upon the theory that common or contract carriage was being performed.[1]

The Supreme Court of Arkansas, on appeal by respondents, with two justices dissenting (R. 232), reversed the decree of the Chancery Court (R. 225) and held that petitioner's drivers who owned tractors which had been leased to petitioners were contract carriers and perforce must obtain Arkansas intrastate contract carrier permits before they could transport petitioner's goods in interstate commerce, and that they were subject to prosecution for violation of the penal provisions of the Arkansas Motor Carrier Act for having failed so to do. Petition for rehearing was duly filed (R. 234), and denied (R. 237).

Prior to approximately March 1, 1950, Whitington employed one form of lease in procuring equipment from owners thereof (R. 25-31) and subsequent to such date another form was utilized (R. 25, 33-36). While petitioner had no connection with or knowledge of arrangements between Whitington and owners of equipment (R. 76, 100), it should be noted that the opinion of the court below is predicated upon analysis of a form of equipment lease not being used when the litigation was instituted or tried and that, as well, the features of the initial form employed by Whitington which were found particularly objectionable by the court below were never enforced by Whitington in his relations with the owners of equipment (R. 38, 76, 87).

[1] A temporary restraining order was first obtained, which was dissolved by agreement that matters would remain in status quo until disposition of application for final injunction (R. 14, 19)., which stipulation was revived after entry of final order by the Supreme Court of Arkansas (R. 238).

We are confident that in brief, should this petition be granted, we shall be able to establish to the satisfaction of this court, upon the record as made, that irrespective of which form of lease was used by Whitington in procuring equipment that petitioner's status, at all times, has been that of a private carrier and that a bona fide employer-employee relationship existed between it and all drivers employed by it.

We believe the opinion of the majority of the court below to be without basis in law or foundation in fact. As it demonstrated to the court below by its petition for rehearing, and as is demonstrated by the enumeration of questions presented herein (p. 2, supra), the opinion of the majority of the court below could have resulted only, firstly, from prefermission of application or erroneous application of controlling principles of law to undisputed facts and, in the next place, findings of fact which, as the dissenting opinion recognizes (R. 232), have absolutely no basis in the record. The district court decisions relied upon in the decision below are obviously distinguishable in fact, and, in principle, support the principles upon which petitioner relies. We shall not here labor the point but it appears obvious that the majority opinion stems from the conclusion that petitioner, engaged solely in interstate commerce, by operating under arrangements held, without factual basis, not to be bona fide is seeking to enjoy the benefits of some privilege or to avoid some supervision which respondents, an intrastate body, might grant or exercise. The answer to the first proposition is obvious; as to the second, without briefing the merits, we can only say that there is not one iota of evidence in the record to support this factual conclusion.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Arkansas erred:

1. In not holding that petitioner is being discriminated against and deprived of its property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. In not holding that interstate commerce is being unduly burdened and destroyed contrary to the provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States.

3. In not recognizing that the only transportation involved is interstate transportation, and that Congress has pre-empted the field of regulation of such motor carrier transportation.

4. In not considering whether petitioner is a private carrier whose primary business is the manufacture of its products, and in not holding that the transportation of petitioner's products could not, at one and the same time, be both private and contract carriage.

5. In not considering whether a bona fide employer-employee relationship existed between petitioner and its truck drivers, and in not holding that, in the transportation of petitioner's products the truck drivers could not, at one and the same time, be both bona fide employees and contract motor carriers.

6. In not considering ownership of motor vehicle equipment determinative of whether private or contract carriage was being performed therewith, and in failing to consider the extent to which petitioner exercised control over the equipment and driver thereof as being material in determining the type carriage being performed.

7. In not holding that petitioner's equipment leases were bona fide, scrupulously observed in actual operations, and in holding that petitioner's method of operation was adopted to avoid compliance with the Arkansas Statute.

8. In failing to recognize economic reality and to consider the absurdity of respondents' position in that the prosecutions involved are for failure to have intrastate permits which, although held, would not cover the transportation being performed.

9. In failing to give any weight to decisions of the Interstate Commerce Commission relating to interstate commerce.

10. In predicating its decision on a factual basis having no support in the record.

11. In failing to affirm the decree of the chancery court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below, as evinced by the majority opinion, clearly approves the effort of a state administrative body to regulate interstate commerce, a field pre-empted by Congress. This under a state statute designed to permit regulation of intrastate commerce. The implications are plain. Each of the forty-eight states, as we will point out more fully should this petition be granted, has a statute comparable to that of the State of Arkansas here involved. Unless the action sanctioned by the court below is declared illegal regulation of interstate commerce by each of the states will be permitted under local statutes.

It is established that the only transportation involved in this proceeding is interstate transportation. The Arkansas Motor Carrier Act, Appendix B hereto, invests the Arkansas Public Service Commission solely and alone with jurisdiction over common and contract carriers engaged

in intrastate commerce; the statute contains no definition of private motor carrier, and permits regulation of interstate commerce only to the extent permitted by the United States Constitution and the Acts of Congress.

The Congress, by enactment of Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 et seq., and by the enunciation of its National Transportation Policy, 54 Stat. L. 899 (U. S. Code, Title 49, notes preceding Secs. 1, 301, 901 and 1001), has completely pre-empted the field of interstate motor carrier transportation.

It is clear, therefore, that the decision of the court below in permitting state regulation of interstate commerce is contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States, and such decision in practical application and inevitable construction when applied to the undisputed facts in this case is directly contra to the numerous decisions of this court establishing the fundamental law of the land to be that no part of the power of regulating commerce that is vested in Congress can be executed by a state, and that when Congress has exercised its paramount and all-embracing authority in the regulation of interstate commerce the power of the state with respect thereto ceases to exist. **Gibbons v. Ogden,** 22 U. S. 1, 6 L. Ed. 23; **Edwards v. People of State of California,** 314 U. S. 163, 62 S. Ct. 164, 86 L. Ed. 119; **Milk Control Board v. Isenburg Farm Products,** 306 U. S. 346, 83 L. Ed. 752; **Hinson v. Lott,** 75 U. S. 148, 19 L. Ed. 387; **U. S. v. Hill,** 248 U. S. 420, 63 L. Ed. 337; **Pennsylvania R. Company v. Public Service Commission of Pennsylvania,** 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142; **Chicago, Rock Island and Pacific R. Company v. Hardwich Farmers Elevator Company,** 226 U. S. 426; **State of Wisconsin v. City of Duluth,** 96 U. S. 379, 24 L. Ed. 668; **Missouri Pacific R. Company v. Stroud,** 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683; **City of Newark v. Central R. Company of New Jersey,** 267 U. S. 377, 45 S. Ct. 328, 69 L. Ed. 663.

As will be demonstrated more fully in brief should this petition be granted, the performance of private motor carrier transportation by the use of leased equipment driven by the owners thereof constitutes a very considerable portion of the interstate motor carrier transportation performed throughout the country, and settlement of the question as to the extent to which such transportation may, by indirection, be regulated, controlled or prohibited by the states is plainly in the public interest. That question is directly presented in this case.

2. The decision of the court below is believed to sanction action of a state regulatory body in enforcement of a state statute which unduly burdens, hinders and destroys interstate commerce, contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States. It is not disputed of record that in each instance when petitioner's drivers were arrested they were engaged in the performance of interstate transportation, delivering petitioner's goods to its customers in fulfillment of its contracts, and that respondents propose to continue such arrests and prevent petitioner from delivering its goods and performance of its contracts unless enjoined from so doing.

The decisions of this court well establish that a state may not enforce any law, or in a manner, the necessary effect of which is to prevent, obstruct or burden interstate commerce, a burden upon interstate commerce being any action of a state which directly impairs the usefulness of facilities for such commerce. It cannot be denied that by the arrests of petitioner's drivers and delay and impoundment of its equipment the interstate commerce in which it was engaged was being burdened and hindered by the attempted enforcement of the Arkansas Motor Carrier Act by the respondents herein. The decision of the court below, in approving such action, is perforce contra to the decisions of this court enunciating the foregoing governing principles. **LaCoste v. Department of Conservation of**

the State of Louisiana, 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437; **Schwab v. Richardson**, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183; **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; **McDermott v. Wisconsin**, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754; **Savage v. Jones**, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182.

3. It is believed that the decision of the court below sanctions actions of the respondents which abridge the privileges of petitioner and deprive it of its property without due process of law. No question of the legitimacy of petitioner's business being involved, nor of its compliance with all police, tax and safety laws and regulations, it is petitioner's position that it should be permitted to sell and deliver its goods in interstate commerce in motor vehicle equipment leased to and operated by it with employees of its own choosing without hindrance from the State of Arkansas until, by some state or federal court or agency having jurisdiction, its operations shall have been held to be illegal. This has not been done. If petitioner is a private carrier of goods solely in interstate commerce, then its employees also so solely engaged perforce cannot be intrastate contract carriers.

Interference with petitioner's operations, sanctioned by the decision of the court below, is believed to contravene Section 1 of the Fourteenth Amendment to the Constitution of the United States, and it is plainly in the public interest for this court to determine the extent to which state regulatory bodies may, by indirection in the enforcement of state statutes abridge the privileges of citizens and prevent them from fulfilling contracts and engaging in legitimate enterprises.

4. The decision of the court below is believed to be erroneous and results from refusal of the court to consider three principal issues: (1) The primary business of petitioner; (2) whether the transportation being performed at

the times petitioner's drivers were arrested was being performed by petitioner as a private carrier; (3) whether a bona fide employer-employee relationship existed between petitioner and its drivers who were arrested.

Petitioner's drivers are held by the court below to be contract carriers within the meaning of the Arkansas Motor Carrier Act (Appendix B). There is no question in the record but that at such times these drivers were transporting petitioner's goods in equipment being operated under petitioner's exclusive direction and control. This court has approved the rule that the primary business of an establishment delivering goods by the use of motor vehicle equipment determines whether it is a private, contract or common carrier. Such, as well, has been the consistent ruling of the Interstate Commerce Commission with respect to interstate motor carrier transportation. The decision of the court below is based upon a refusal to consider applicability of the primary business test and is, therefore, believed to be contra to the decision in **Brooks Transportation Company et al. v. United States of America et al.**, 93 F. Supp. 517, affirmed per curiam 340 U. S. 925, as well as of the decisions of the Interstate Commerce Commission therein involved, **Lenoir Chair Company—Contract Carrier Application**, 48 M. C. C. 259, and **Schenley Distillers Corporation—Contract Carrier Application**, 48 M. C. C. 405. If petitioner's primary business is the manufacture and distribution of roofing products it is a private carrier.

Clearly the question whether transportation can **at one and the same time be private and contract carriage**, as well as the question whether a truck driver can **at one and the same time be a bona fide employee of a private carrier** and, in the performance of the same transportation, **a contract carrier**, are questions of importance in the administration of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 301 et seq.) the terms involved

being defined at Section 303 (a) (15) (17); Appendix B hereto.

On the record in this case the foregoing impossible situations would be a necessary result of the decision below.

Settlement of the foregoing questions by this court is plainly in the public interest since they are likely to be presented in enforcement proceedings by various states, and such would be a guide as well as to the proper construction of the federal statute.

5. This court has plainly said that in matters of interstate transportation the opinions of the Interstate Commerce Commission are entitled to great weight. **United States et al. v. American Trucking Association,** 310 U. S. 534, 60 S. Ct. 1059; **Levinson v. Spector Motor Service,** 330 U. S. 649. Such admonition was utterly ignored by the majority opinion below, but was recognized in the minority opinion (R. 225, 232).

In **Watson Manufacturing Company, Inc.—Common Carrier Application,** 51 Motor Carrier Cases 223, the Interstate Commerce Commission specifically held that the owner of motor vehicle equipment could lease same to a private carrier and then be employed by the carrier as the driver thereof without becoming a contract carrier within the meaning of the Interstate Commerce Act [U. S. Code, Title 49, Section 303 (a) (15)]. Such Act is the only legislation applicable to the case at bar inasmuch as interstate transportation alone is involved. The foregoing decision of the Interstate Commerce Commission should be controlling.

Furthermore, the Interstate Commerce Commission has long since enumerated those aspects of motor carrier transportation which must be present before it can be said that contract carriage is being performed. The court below entirely ignored these decisions, as well as the fact that

not one element of contract carriage is reflected by the record in the case at bar. See **Contracts of Contract Carriers**, 1 Motor Carrier Cases 628; **Filing of Contracts by Contract Carriers**, 2 Motor Carrier Cases 55; **Western Transport Company—Contract Carrier Application**, 2 Motor Carrier Cases 107.

It is plainly in the public interest for this court to settle the question as to whether, with respect to interstate motor carrier transportation, the opinions of the Interstate Commerce Commission or those of state courts are to be controlling. Every private carrier of property operating with leased equipment driven by the owner thereof is affected by a correct decision of this question.

6. It is believed that the decision of the court below contravenes the National Transportation Policy as enunciated by Congress (54 Stat. L. 899; notes preceding U. S. Code, Title 49, Sections 27, 301, 901, and 1001, Appendix B), requiring fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, and to be contra to the decisions of this court in implementation thereof.

The decision of the court below ignores entirely the undisputed fact that at all times the leased motor vehicle equipment was under the **exclusive** direction and control of petitioner, and such decision is obviously predicated on the sole question of ownership thereof. Thus, although no question is made but that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers (which fact the court below also ignored) the practical effect of the decision below is that petitioner's employees driving their own equipment leased to petitioner are contract carriers, whereas its other truck drivers, employed, directed and supervised on exactly the same basis, are not affected by the Arkansas Motor Carrier Act.

We know of no decision of this court on the question whether exercise of direction and control or ownership

of motor vehicle equipment is determinative of whether **contract** carriage is being performed, but the Interstate Commerce Commission, as well as this court, in determining whether **common or other carriage** was being performed and by whom have held that the person who assumed full responsibility for the direction, operation, and control of the equipment, and acknowledged its responsibility to the public therefor, was the carrier, irrespective of ownership of the equipment. **Floyd H. Johnson—Extension,** 17 Motor Carrier Cases 733, 740; **Performance of Motor Common Carrier Service by Riss & Company, Inc.,** 48 Motor Carrier Cases 327, 359; **Thomson v. United States,** 321 U. S. 19, in all of which decisions the "control and responsibility test" was recognized as being determinative of the carrier status of affected persons.

The decision of the court below applies solely to the "ownership test" and ignores the "control and responsibility test." It is, therefore, greatly in the public interest that this court determine whether the same or different standards are to be applied as between common, contract or private motor carrier transportation in interstate commerce is being performed. Every private carrier in the United States delivering its merchandise in interstate commerce by the use of equipment leased from the drivers thereof will be directly affected by this decision.

7. The decision of the court below is believed to ignore practical reality. It sanctions the arrest and conviction of petitioner's drivers for not having contract carrier permits issued by the Arkansas Public Service Commission. It apparently is predicated upon the assumption that petitioner by its method of operation seeks to enjoy some privilege which the Arkansas Public Service Commission might grant or to avoid some supervision which the Commission might exercise. It entirely ignores the fact that only interstate transportation is being performed and that, insofar as the issues in this case or the criminal proceed-

ings are concerned, the only authority of the Arkansas Public Service Commission is with respect to intrastate transportation, and there is no legislative sanction requiring a motor carrier to obtain intrastate operating authority for the performance of interstate transportation.

It is plainly in the public interest for this court to settle the question whether the states may require motor carriers engaged solely in interstate transportation to obtain intrastate operating rights from the various state regulatory bodies. Every interstate motor carrier in each of the forty-eight states will be affected by settlement of this question.

SUMMARY.

For the foregoing reasons it is respectfully presented that substantial questions of statutory and constitutional considerations are involved, as well as a determination of the extent to which a state may exercise control over interstate motor carrier transportation, and that settlement by this court of the various questions presented would be plainly in the public interest in that the rights and responsibilities of all interstate motor carriers would be determined. For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Counsel for Petitioner.

Of Counsel for Petitioner:
WRAPE & HERNLY,
1804 Sterick Building,
Memphis, Tennessee.

1624 I Street,
Washington 6, D. C.

APPENDIX A.

Certificate as to the Existence of a Federal Question.

"On motion of Lloyd A. Fry Roofing Company, appellee, this court, in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the opinion and per curiam opinion heretofore rendered and made herein, that said appellee properly raised and presented to this court by brief, oral argument and petition to rehear the federal questions that the proposed enforcement and method of enforcement of the Arkansas Motor Carrier Act, Act 367 of the Acts of 1941, Arkansas, deprived appellee of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that thereby interstate commerce was unduly burdened and destroyed and the Arkansas Public Service Commission was attempting to regulate interstate commerce in a field completely preempted by Congress, contrary to Article 1, Section 8, Clause 3, of the Constitution of the United States and Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 et seq. And it became material to the determination of this case in this court to determine said question so made by appellee, which questions were considered and determined by this court adversely to said appellee, as appears from the entry of per curiam order overruling appellee's petition to rehear.

"It is hereby certified that this court is the highest court of law and equity in the State of Arkansas in which a decision of this case could be had.

"Enter this the 11th day of February, 1952.

Supreme Court of Arkansas.

"I, Griffin Smith, Chief Justice of the Supreme Court of Arkansas, do hereby approve entry of the foregoing cer-

tification as being the action taken and made by the Supreme Court of Arkansas en banc on the day and date aforesaid.

/s/ Griffin Smith,
Chief Justice, Supreme Court of
Arkansas."

APPENDIX "B."

Pertinent portions of statutes involved:

Act 367 of the Acts of Arkansas, 1941, Arkansas Motor Carrier Act:

"Section 3. The provisions of this Act except as hereinafter specifically limited, shall apply to the transportation of passengers or property by motor carriers over public highways of this state, and, to the procurement of, and provision of, facilities for such transportation; and the regulations of such transportation, and the procurement thereof and the provision of facilities therefor, is hereby vested in the Arkansas Corporation Commission.[1]

"Section 4. Nothing herein shall be construed to interfere with the exercise by agencies of the Government of the United States or its power of regulation of interstate commerce.

"Section 5. (a) As used in this Act—

"(7) the term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or indirectly, or by a lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public by motor vehicle for compensation whether over regular or irregular routes.

"8. The term 'contract carrier by motor vehicle' means any person, not a common carrier included under paragraph 7, Section 5 (a) of this Act who or which, under individual contracts or agreements and whether directly or indirectly or by a lease of equip-

1 Under Act 40 of the Acts of Arkansas, 1945, the powers previously vested in the Arkansas Corporation Commission were transferred to the Arkansas Public Service Commission.

ment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation.

"Section 5. (b) Nothing in this Act shall be construed to include . . . (3) any private carrier of property.

"Section 6. (a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this Act . . . (2) to regulate contract carriers by motor vehicle as prescribed by this Act . . .

"Section 11. (a) No person shall engage in the business of a contract carrier by motor vehicles over any public highway in this state unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business . . ."

"Section 22. (a) Any person knowingly and willfully violating any provision of this Act . . . shall, upon conviction thereof be fined not more than $100.00 for the first offense and not more than $500.00 for any subsequent offense. . . ."

"Section 25. The terms and provisions of this Act shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the Acts of Congress."

Part II, Interstate Commerce Act, Title 49, U. S. Code, Sections 301 et seq.:

"Section 303. (a) As used in this part—(15) the term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein [common carrier transportation] by

motor vehicle of passengers or property, in interstate or foreign commerce for compensation."

"Section 303. (a) As used in this part—(17) the term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

"Section 304. (a) It shall be the duty of the Commission—(2) to regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operations, and to that end prescribed qualifications and maximum hours of service of employees, and standards of equipment . . ."

National Transportation Policy Enunciated by Congress (54 St. t. L. 899; U. S. Code, Title 49, Notes Preceding Section 1, 301, 901 and 1001):

"It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each. . . ."